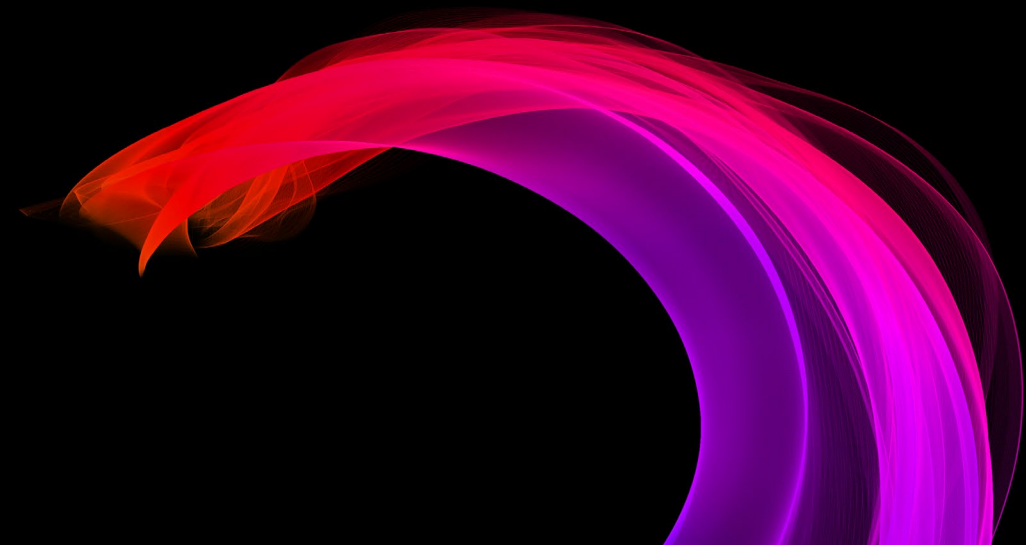




# A New Wave in Workplace Law

Inside Counsel Conference 2020 February 26–28, 2020



# The Ebb and Flow of Labor Relations Policy and Procedure at the NLRB

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# NLRA Refresher

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- Passed in 1935
- Administered/enforced by NLRB
  - 34 Regions investigate ULP charges and conduct representation elections.
  - General counsel prosecutes ULP Complaints.
  - ALJs hold evidentiary hearings.
- Regulates union and non-union employers
- Counterparts in other arenas
  - Public sector
  - Railway Labor Act
  - International labor relations models

# A Closer Look at the NLRB

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- 5 members when operating at full compliment
  - 5-year staggered terms (3 from majority party)
  - Issue administrative rules (rulemaking)
  - Rule on ALJ decisions (decision making)
- Broad scope of authority
  - Organizing
  - Negotiations
  - Concerted protected activity
- Subject to shifts in political ideology
- Increased focus on non-union employers

# Current NLRB Members

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- John Ring – Chair (R)
- William J. Emmanuel (R)
- Marvin E. Kaplan (R)
- Vacant (D)
- Vacant (D)

\* Peter Robb appointed General Counsel on November 1, 2017.

# New GC – New Priorities

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- Board precedent remains in flux
  - Party in White House moves pendulum.
  - Republicans hold Board majority for first time in 10 years.
- More consistency at local agency level
  - Regional directors, ALJs, and other staff.
  - Continue applying past precedent.
  - Until GC, NLRB, or federal courts change it.
- General Counsel sets enforcement agenda.

# Email Use

- **Prior Law:** Statutory right to use employer's email system to engage in Section 7 activity during non-working time. *Purple Communications*, 361 NLRB 1050 (2014)
- **New Law:** No statutory right.
  - *Caesars Entertainment*, 368 NLRB No. 143 (2019)
    - *Purple Communications* placed too little weight on the employer's property rights in their IT resources and overstated the importance of the needs of employees to use those resources to engage in union or other protected concerted activity.
    - Oral solicitation and face-to-face literature distribution more than adequate.
    - The prevalence of smartphones, personal email accounts, and social media further support conclusion that prohibition on use of employer's email system for nonwork purposes does not create an unreasonable impediment to employees' ability to exercise their statutory rights.

# Confidentiality Rules

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- **Prior Law:** Blanket confidentiality requirements unlawful.
- **New Law:** Confidentiality rules limited to duration of investigation always lawful.
  - *Apogee Retail LLC d/b/a Unique Thrift Store*, 368 NLRB No. 144 (2019)
    - Confidentiality rules that are *limited to the duration of an investigation* are always lawful.
    - Confidentiality rules that are *not specifically limited to the duration of an investigation* require a case-by-case balancing of employer and employee interests.

# Protected Concerted Activity

- **Prior Law:** Virtually any employee complaint made to management in the presence of coworkers constitutes protected concerted activity (“PCA”).
- **New Law:** Only truly group complaints can be PCA.
  - *Alstate Maintenance, LLC*, 367 NLRB No. 68 (2019)
    - Only truly “group” complaints constitute PCA.
    - Individual griping not PCA merely because carried out in presence of coworkers and involves the word, “we.”
    - Customer tipping habits not a term or condition of employment.
  - *Quicken Loans, Inc.*, 367 NLRB No. 112 (2019)
    - No evidence of preexisting concerns or attempt to initiate or induce group action undermines claim of PCA.



# Cell Phone Policies

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- **Prior Law:** A workplace rule that has a reasonable tendency to coerce employees in the exercise of Section 7 rights is presumed to be unlawful. *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).
- **New Law:** Under the Board's 2017 *Boeing* decision the agency set aside this standard in favor of one that balances the nature and extent of impact on Section 7 rights against the employer's justification for administering the rule. More recently, the agency upheld a policy prohibiting drivers from possessing cell phones within company vehicles as a "Category I" rule, rendering it lawful *per se*. *Argos USA*, 369 NLRB No. 26 (2020).

# Access Rights (Nonemployee Union Representatives)

- **Prior Law:** “Public Space” exception—nonemployee union representatives can’t be denied access to employer property open to public if used in manner consistent with intended use and not disruptive.
- **New Law:** No public space exception.
  - *UPMC*, 368 NLRB No. 2 (2019)
    - Employers no longer have to allow nonemployee union representatives on public property, unless no other reasonable means of communicating with employees, or employer discriminates.
    - Discrimination – Permitting similar activity in similar relevant circumstances by other nonemployees.

# Access Rights (Off-Duty Contractor Employees)

- **Prior Law:** Off-duty employees of onsite contractor who work regularly on property have right to access for Section 7 purposes.
- **New Law:** No off-duty contractor employee access rights unless regularly and exclusively on property and contractor's employees have no reasonable alternative channels of communicating.
  - *Bexar County Performing Arts Center Foundation*, 368 NLRB No. 46 (2019)
    - Off-duty employees of a contractor are trespassers who are only entitled to access for Section 7 purposes if:
      - (1) the employees work both regularly and exclusively on the property, and
      - (2) the property owner cannot show that the contractor's employees have one or more reasonable alternative nontrespassory channels of communicating with their target audience.

# Access Rights (Nonemployees In Shared Public Area)

- **Prior Law:** Unlawful to bar nonemployees from soliciting/distributing in shared area (e.g., parking lot) if charities or other groups are permitted to assemble and solicit/distribute.
- **New Law:** Lawful to bar nonemployees in shared areas unless allow activities that are similar in nature (e.g., other union organizers).
  - *Kroger Limited Partnership 1 Mid-Atlantic*, 368 NLRB No. 64 (2019)
    - Discrimination only where unequal treatment of activities that are “similar in nature.”
    - Union activity bears little resemblance to charitable information and solicitation drivers.

# Independent Contractor Standards

- **Prior Law:** Economic realities test applied. Considered actual, not theoretical, control.
- **New Law:** Common-law agency test applies.
  - *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019)
    - (a) The **extent of control** which, by the agreement, the master may exercise over the details of the work.
    - (b) Whether or not the one employed is engaged in a **distinct occupation or business**.
    - (c) The **kind of occupation**, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision.
    - (d) The **skill required** in the particular occupation.
    - (e) Whether the employer or the workman **supplies the instrumentalities, tools, and the place of work** for the person doing the work.
    - (f) The **length of time** for which the person is employed.
    - (g) The **method of payment**, whether by the time or by the job.
    - (h) Whether or not the work is **part of the regular business of the employer**.
    - (i) Whether or not the **parties believe** they are creating the relation of master and servant.
    - (j) Whether the **principal is or is not in business**.
  - *Velox Express, Inc.*, 368 NLRB No. 61 (2019) – No violation of NLRA to misclassify

# Joint Employer

- **CURRENT Law:** In evaluating whether an employer possesses sufficient control over employees to qualify as a joint employer, the Board will – among other factors – consider whether an employer has exercised control over terms and conditions of employment *indirectly* through an intermediary, or whether it has *reserved the authority to do so*. *Browning Ferris*, 362 NLRB 1599 (2015).
- **PROPOSED Law (Regulation):** An employer may be found to be a joint-employer of another employer's employees only if it possesses and exercises substantial, direct and immediate control over the essential terms and conditions of employment and has done so in a manner that is not limited and routine. Indirect influence and contractual reservations of authority would no longer be sufficient to establish a joint-employer relationship. 83 FR 46681.

# New Quickie Election Rules (Effective 4/16/20)

- **Notice of Petition for Election** - 5 business days to post Notice of Petition for Election (up from 2 business days).
- **Statements of Position** - Due 8 business days from notice of hearing (up from 7 calendar days).
- **Pre-Election Hearing** - Scheduled 14 business days from notice of hearing (up from 8 calendar days).
- **Eligibility Disputes** - Litigated at pre-election hearing, briefed and resolved before direction of election.
- **Election Date** - Generally no less than 20 business days from direction of election, absent mutual consent.
- **Voter List** - Due 5 business days from direction of election (up from 2 business days).
- **Deadline Extensions** - Regions will have greater latitude to extend deadlines for good cause shown.
- **Net Result** - Average time period between petition and election will likely increase from 23 to 35 days in stipulated cases.
- **Contested Cases** – Average time period will likely increase from 36 to 48 days.

# The PRO Act – A Glimpse Into the Future?

- The Protecting the Right to Organize Act (H.R. 2474) proposes the most significant labor law reforms in decades.
- Goes beyond EFCA in scope.
- Contains a “wish list” of legislative changes on behalf of organized labor:
  - Eliminates right-to-work laws
  - Narrows standard for independent contractor status
  - Increases penalties for ULP violations during organizing campaigns
- 218 House Co-Sponsors
- Future success is tied to fall Senate and Presidential Elections
- Supporters point to continued decline in union membership (6.2% in private sector)



# The PRO Act – Other “Wish List” Items

- Replace secret ballot with card check
- Revive prior, more expansive definition of joint employer
- Resurrect proposed expansion of “persuader reporting rule”
- Overturn modified quickie election timetables
- Reinstate limited ban on class waivers in arbitration agreements
- Mandate consummation of contract terms even in absence of mutual agreement
- Create private right of action with compensatory and punitive damages
- Eliminate right to permanently replace economic strikers
- Legalize intermittent strikes, secondary boycotts and related activity
- Reinstate recognition bar

# What Else May Be Coming?

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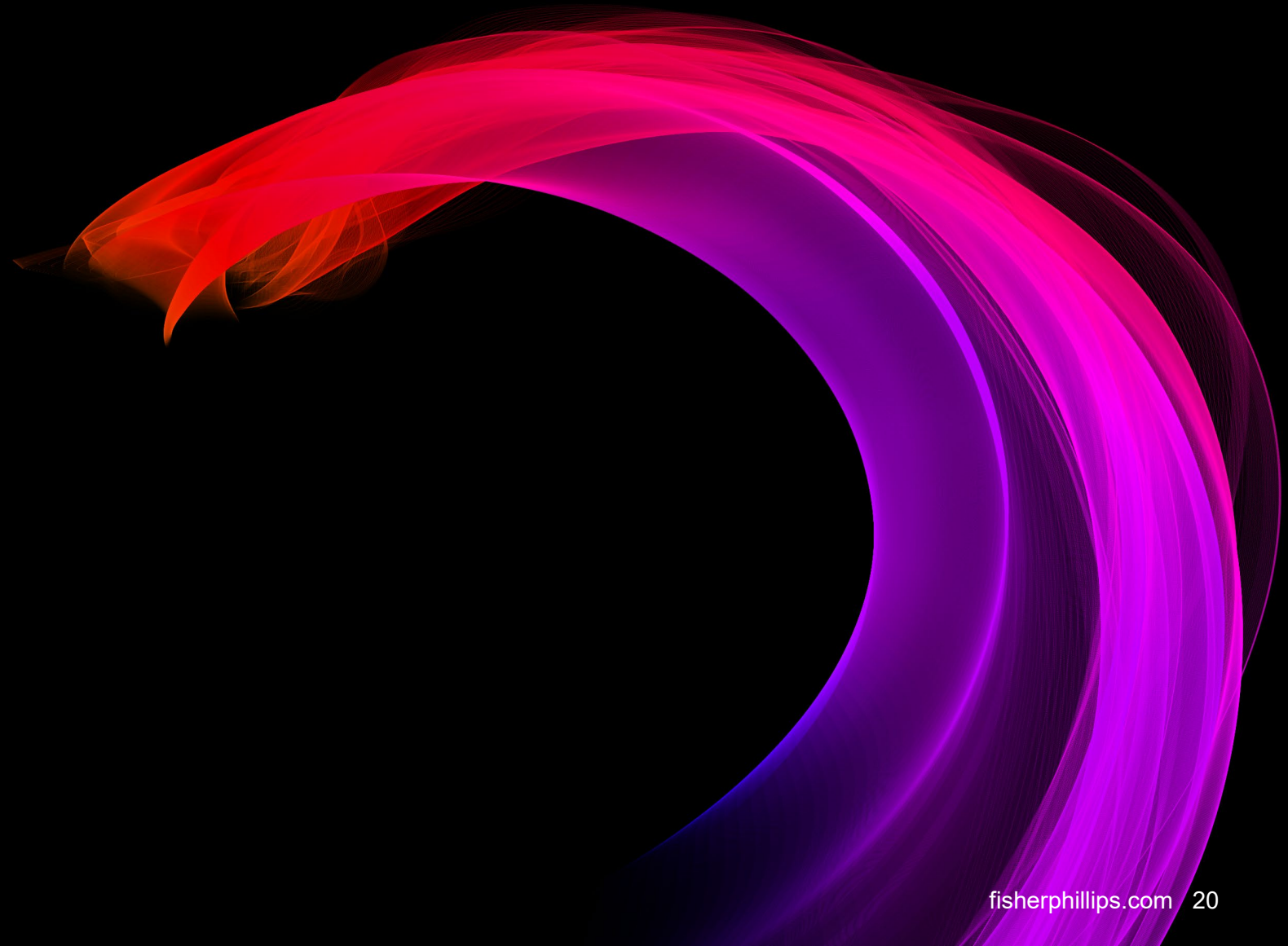
- Further clarity on handbook rules
- More limits on protected activity
- Clarity on class waiver/arbitration rules
- Bannering/demonstration restrictions
- Clarity on successor doctrine
- Bargaining over discipline during 1<sup>st</sup> CBA negotiations
- Furnishing witness statements

# The Climate is Changing – But For How Long?

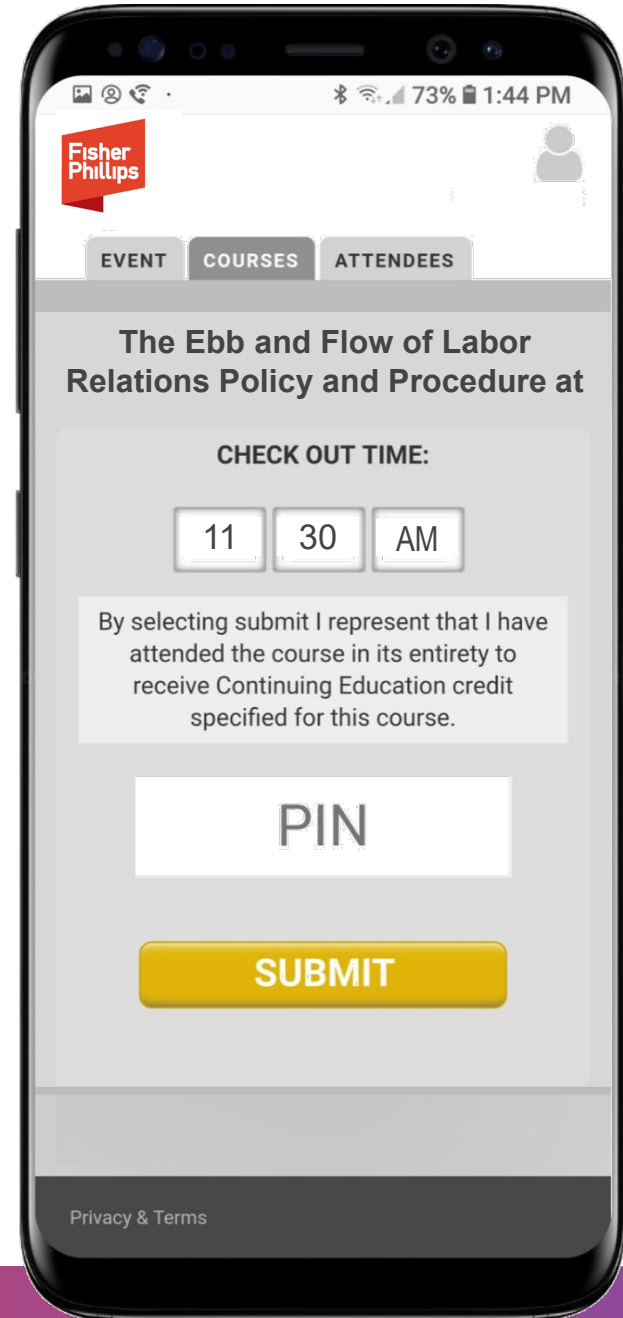
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- Advantageous climate when it comes to overturning controversial precedent.
- Employers are increasingly aligned with Office of the General Counsel.
- Cases that were once ripe for settlement may need to be approached differently.
- Other cases may now be settled on more favorable terms.
- More time between petition and election means more informed decisions.
- The question remains – will the pendulum swing back, and if so, when?

# Questions?



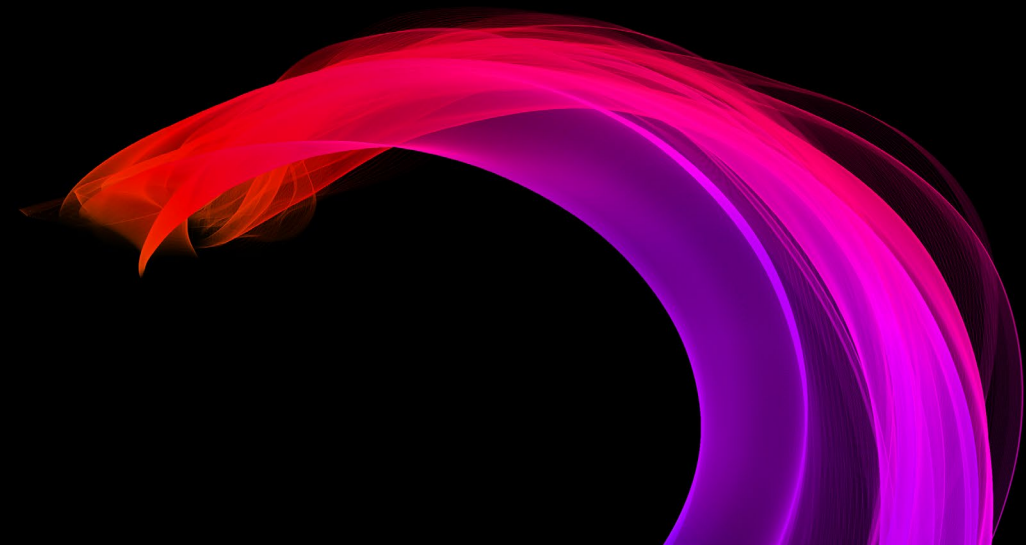
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# Thank you